United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

633

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,921

United States Court of Appeals
for the District of Columbia Circuit
FILED AUG 19 1969
Nathaniel J. Pettibone

UNITED STATES OF AMERICA

V.

CARROLL R. LEACH, JR.

CRIMINAL NO. 1437-67

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	Page
Table of Cases	3
Statutes Cited	3
Statement of Issues Presented for Reviw	4
References to Rulings	5
Statement of the Case	6
Argument	14
1. A Pretrial Identification of Appellant Did Not Comply With Due Process	14
2. Appellant Was Denied Due Process In the Trial In Respect of the Use of an Interpreter	17
Conclusion	24

TABLE OF CASES

	Page
Aaron v. State 273 Ala 337, 139 So. 2d 309 (1961)	15
Barrett v. State 190 Tenn. 336, 229 S.W. 2d 510 (1950)	15
*Birmingham E. Light & Power Company v. Jung 161 Ala 481, 49 So. 434 (1909)	21
Bishop v. State 236 Ark 12, 346 S.W. 2d 676 (1963)	15
*Christian v. United States 398 F 2d 519 (1968)	22
*Gilbert v. State of California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)	16
Hilbert v. Mundicoff 204 Cal. 405, 268 P 905 (1928)	20
Lujan v. United States 209 F 2d 190 (1953)	20
Mares v. United States 391 F 2d 538 (1968)	23
*Mo. K.T. Ry. Co. v. Hagley 60 Kan 424, 56 P 759 (1899)	20, 21
People v. Berne 384 Ill 334, 51 N.E. 2d 578 (1943)	15
People v. Martin 304 Ill 494, 136 N.E. 711 (1922)	15
*People v. Len Deo 132 Cal 199, 64 P 265 (1901)	20
State v. Korich 130 Wash. 243, 226 P. 1016 (1924)	20
*Stoval v. Denno 388 U.S. 293, 87 S. Ct. 1967 18 L. Ed. 2d 1199 (1967)	16
*United States v. Wade 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 1149 (1967)	15

STATUTES:

*18 U.S.C. 3006A (e)	22

*Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. A pretrial identification of appellant did not comply with due process in that appellant was shown to the identifying witness alone at a time when he did not have counsel present.

2. Appellant was denied due process in the trial by being subjected to the testimony of accusing witnesses through an interpreter, produced by the prosecution, whose competency or qualification was not duly established; and appellant was not afforded a competent interpreter on his own behalf.

This case has not been before this Court previously.

[illegible] OF ISSUES

Judgment which was entered March 7, 1969 and filed March 10, 1969, is based upon a verdict of guilty returned by a jury on October 23, 1968 (Tr 261, 262).

STATEMENT OF THE CASE

This is an Appeal from the United States District Court for the District of Columbia in Criminal case No. 1437-67 wherein the appellant, Carroll H. Leach, Jr., was convincted on two counts, namely, housebreaking and grand larceny. The appellant was sentenced to serve four to twelve years on count one and three to nine years on count two, to run concurently. The appellant appeals said judgment.

The record shows that the appellant was arrested on October 4, 1967 (Tr 8). A pretrial out of court identifixation of the defendant - appellant was made on October 9, 1967 in a courtroom of the District of Columbia Court of General Sessions. Just one prisoner was brought into the courtroom (Tr 9) at the time a supposed identification of the appellant was made by a Miss Soila Miranda, who spoke no English (Tr 10).

Upon direct examination of police officer Tiffin the following occurred (Tr 9):

> "All right.
>
> Now, would you please tell us as best you can recall first how many people were there in the courtroom and how many prisoners were there in the courtroom at the time the defendant entered the courtroom".

> A. Just one prisoner was brought in, the Ambassador's wife, the maid, the butler and myself, and I don't believe there was any other persons in the rear of the court-room.

Miss Miranda was a maid who worked at the Ecuadorian Embassy. She communicated her out of Court identification of defendant through the Ambassador's wife (Tr 11), Mrs. Doris Mantilla. Apparently court was not in session at this time and the judge was not on the bench (Tr 17, 18). This supposed identification was done in the Spanish language when the Ambassador's wife was speaking to the maid and then related to a police officer. The police officer stated that he did not have the faintest idea of what the two women were talking about (Tr 19) but the police officer stated that the Ambassador's wife stated to him that the maid recognized the defendant Leach, as a man she had seen in the Embassy (Tr 19). All of this transpired when the appellant, Leach, was brought in the courtroom of the Court of General Sessions and at the time when he did not have counsel present and representing him.

At the trial of the case the Government produced one Osadora Losada, a butler at the Embassy. He also spoke only in Spanish. Prior to his testimony an interpreter was produced by the prosecution, one Mrs.

Susan T. Murray. The record states as follows (Tr 20):

> [illegible] was called as a witness on behalf of the Government, was duly sworn, and testified as follows:
>
> THE COURT: Tell him to take a seat. First we will swear the interpreter.
>
> Thereupon, MRS. SUSAN T. MURRAY was duly sworn as interpreter.

Nothing in the record shows that anyone inquired whether or not Mrs. Susan T. Murray was competent in the Spanish language and was proficient or qualified to act as an interpreter. Nothing in the record shows how Mrs. Murray happened to appear in the court in the case.

(Counsel herein who has been appointed by this Court has made an investigation off the record. An inquiry with the clerk of court, United States District Court, disclosed that Mrs. Murray did not appear as an officer of the court produced by the clerk. A further inquiry with Mr. Schoenfeld, the Assistant United States Attorney who prosecuted the case, who is no longer in the United States Attorney's office but is now in private law practice, disclosed that he merely asked the administrative desk of the United States Attorney's office to get an interpreter. A further inquiry with the administrative desk of the United States Attorney's office disclosed that Mrs. Murray may have been secured from the State Department.

Further inquiry with Mr. Richard L. Walch, attorney for the defendant, appointed by the United States District Court, shows that he did not produce the interpreter and so far as he could remember no one had qualified Mrs. Murray as a competent interpreter.)

The evidence presented through the said interpreter as given by the witness Locada showed that he was employed on October 4, 1967 as a butler at the Ecuadorian Embassy at 2223 California Street, N.W. (Tr 29). The witness stated that on the day in question, October 4, 1967 at about 2:15 in the afternoon he went out of the Embassy and saw a man in a taxi at which time he took the tag numbers of the taxi cab and gave it to the Ambassador's wife, Mrs. Mantilla.

One Samuel Porter was produced as a witness for the prosecution and stated that he was driving a cab on Wednesday, October 4; that he picked up a fare at about 2:15 in the afternoon on October 4, 1967 in the vicinity of Massachusetts Avenue and S Street, N.W., and took the fare to 1730 Kalorama Road, N.W. (Tr 38). The witness stated that later that day he identified the fare, a man, in police precinct 13 (Tr 40) but the witness could not identify that person in the courtroom at the time he was testifying in this trial. (Tr 44).

The Government produced Doris Mantilla as a witness who testified that after having been given a taxi cab number on October 4, 1967 she called the police (Tr 62). The witness also testified that a portable radio was missing on that day and certain jewelry which she identified by photographs (Tr 63-68).

The prosecution next produced Noila Miranda who testified through the same interpreter who acted on her previous oath (Tr 76,6). Through the interpreter the witness testified that she was not sure that anyone else was in the court, other than the accused in the Court of General Sessions but that one person was with the accused (Tr 79). The witness testified that the man she was speaking about whom she had identified in General Sessions Court was the man who ran out of the house on the day that certain things were taken and she identified him as the defendant sitting in the trial (Tr 91).

The Government produced as a witness one Ella Robinson who testified that she saw the appellant in her house on October 4, 1967; that he just walked in (Tr 110) with a radio which he set on a dining room table, opened up his shirt and took out some jewelry and put it on the dining room table (Tr 111); that he asked her to hide this material (Tr 112) that she asked him to get

out of here with that stuff (Tr 112) and that he put it in a shopping bag hanging by the refrigerator, took the little girl named Sugar Boo by the hand and walked out the door (Tr 112).

The Government produced officer Roman G. Giffin, a private in the Metropolitan Police Department who stated that on October 4, 1967 in response to a radio call he went to 1746 Kalorama Road, N.W., where he saw the defendant (Tr 135) going out of the front door with a child by the hand; that they went into the house with the defendant, saw Mrs. Robinson and entered; that Officer Motrell asked if he could look in the kitchen which he did. In the kitchen Officer Motrell located a radio and a large silver bracelet and several rings in a shopping bag (Tr 137). The witness stated that the police officers at that time placed defendant under arrest (Tr 137).

The prosecution witness Zoila Miranda testified through the interpreter that she had been told that they caught the man who had committed the robbery and that she had been told that they would ask her to come to identify him. She said that Mrs. Mantilla told her that she would be asked to come to General Sessions Court to identify the man who had been in the Embassy (Tr 104-105).

Carroll R. Leach, Jr., appellant - defendant, took

the stand in his own behalf. He stated that he lived at 1006 Vernon Street, N.W., with his grandmother and his mother (Tr 163). The witness stated that he had a step child by his common law wife named Barbara Alexander and also called Sugar Boo and this was the child that Mrs. Robinson took care of and that he went to Mrs. Robinson's house on October 4, 1967 to pick up Sugar Boo (Tr 166). The witness stated that he did not have anything with him when he went into the house (Tr 168-169). The witness stated that he was close to the front of the house on said date when the police stopped him (Tr 170-171). The police officers asked him whether or not he would mind coming back into the house that he said he would not (Tr 171).

The witness stated that on October the 4th at around 2:35 in the afternoon prior to going to Mrs. Robinson's house he had been at the Manhattan cafe at 17th and Willard Streets several blocks from Mrs. Robinson's house (Tr 176-177); that he walked the distance from there to Mrs. Robinson's; that it took about six minutes or a little more because he stopped and talked to certain persons (Tr 176-177); that he had been in the Manhattan cafe with Alvin who was Mrs. Robinson's grandson and they were sitting there watching the preliminaries of the world series on the television (Tr 177); that the game

was just getting started when he left.

On cross-examination the defendant stated that he had been in his home from midnight the night before until 12:30 the next day in which time he left and went to the Manhattan cafe (Tr 182-183). The witness stated that he went from the Manhattan cafe to "Grandma's" house which is Mrs. Robinson's house at 1726 Maloroma Road prior to encountering the police outside; that he had been in Mrs. Robinson's house five or six minutes before he saw the police officers outside (Tr 194); that he was walking up the street with his little god child when the police officers stopped him (Tr 195). The witness stated that he did not take a taxi to Mrs. Robinson's house (Tr 196) and that while he was inside her house he did not take off his shirt (Tr 196).

The defendant stated that he did not see the jewelry represented by three photographs, either at 1726 Maloroma Road on October 4, 1967 or at 2320 Bancroft Street, N.W. (Tr 201); and that he had never held the said jewelry in his hands. The witness stated that he did not put any jewelry on Mrs. Robinson's table (Tr 203).

Counsel argued and the Court charged the jury who, after deliberation, returned a verdict of guilty on both counts.

A R G U M E N T

A PRETRIAL IDENTIFICATION OF THE DEFENDANT BY NOT SOLELY HIM AND BY A MAID

(The Court's attention is directed to the following pages of the reporter's transcript: 9,10,11,16,17,18,83, 91-105)

The record shows that there was a pretrial out-of-court identification of the appellant made in a courtroom of the District of Columbia Court of General Sessions, (Tr 9,10,11) at which time a maid, who spoke only Spanish and no English, working in the home of the complaining witness, supposedly identified the appellant as the man she had seen at the embassy (Tr11). At that time the defendant was brought into the courtroom alone when the court was not in session (Tr 17, 18) and the judge was not sitting on the bench. At that time there was present in the courtroom, in addition to the arresting police officer, the maid who did the identifying, (her employer) the ambassador's wife, and a butler (Tr 9). Prior to the said persons coming to the Court of General Sessions, the arresting police officer told them that they had caught and arrested the man (Tr 16, 83) and had recovered certain items (Tr 16) and asked them to "come down and help us out along these lines and make any testimony that might be necessary in the case" (Tr 16). The Spanish speaking maid

was told by Mrs. Mantilla, the ambassador's wife, that they had caught the man and she was asked to come to the General Sessions Court and identify the man she had seen in the embassy (Tr 104, 105).

The appellant claims that such suggestive procedures as telling the witnesses that the appellant was arrested and then bringing appellant into a courtroom before the witnesses alone was an improper influence to such an extent that the identifying witness, the maid, did not have any free choice, hence depriving appellant of a fair trial.

United States v. Wade 388 U.S. 218 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). Citing: Aaron v. State, 273 Ala. 337, 139 So. 2d 309 (1961); Bishop v. State, 236 Ark. 12, 364 S.W. 2d 676 (1963); People v. Perme, 384 Ill. 334, 51 N.E. 2d 578 (1943); People v. Martin, 304 Ill. 494, 136 N.E. 711 (1922); Barrett v. State, 190 Tenn. 366, 229 S.W. 2d 516, 18 A.L.R. 2d 709 (1950). Appellant avers that the manner in which the said witness was required to identify him as the accused in the pretrial confrontation, for all practical purposes determined the appellant as the accused in his subsequent trial, and thereby deprived him of a fair trial. United States v. Wade (supra).

During all of the pretrial identification proceedings in the courtroom of the Court of General Sessions, the

appellant did not have counsel present. Appellant states that he was entitled to have counsel present at this time since his confrontation with the witnesses against him was a "critical stage" of the procedings and the failure of being furnished counsel at this time was a denial of due process. United States v. Wade 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); Gilbert v. State of California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967), Stovall v. Denno 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

Accordingly, appellant contends that the in court identification (Tr 91-105) should not have been admitted without first determining that it was not tainted by the illegal confrontation in General Sessions Court and the failure of the trial court to determine whether or not it was of independent origin was constitutional error. Gilbert v. State of California (supra).

APPELLANT WAS DENIED DUE PROCESS
IN THE TRIAL IN CONSIDERATION OF THE USE OF AN INTERPRETER

(The Court's attention is directed to the following pages of the reporter's transcript: 28, 75-88, 91-106).

The record shows that the appellant was confronted by two accusing witnesses through the testimony of an interpreter, one Mrs. Suzan M. Murray (Tr 28). The testimony of the witness, Isadoro Losada was circumstantial. But the testimony of a maid, Doila Miranda, who spoke only in Spanish, showed that she was the only witness who could identify the appellant and connect him directly with the alleged crime (Tr 75-88, 91-106). Her testimony is crucial since without it the case against the appellant would be largely circumstantial. Identification in this case is essential to the prosecution in the light of the appellant's defense of alibi.

At no point in the record does it show that any one, Judge, prosecutor, defense counsel, or courtroom clerk, made any inquiry as to the competency of the interpreter, who was apparently produced by the prosecution. There is only a perfunctory statement (Tr 28): "Thereupon, Mrs. Suzan M. Murray was duly sworn as interpreter." It is assumed that the courtroom clerk gave the usual oath in

this instance. Counsel for the appellant, appointed by this Court, has made inquiry of the court clerk's office and has been informed that the usual oath is substantially as follows:

> "Do you solemnly swear that you will well and truly interpret unto this witness (name)___ the questions as to which shall be propounded to him by the Court and counsel and that you will well and truly interpret to the Court, counsel and the jury this testimony that shall be delivered by this witness so help you God."

This is usually followed by the following:

> "Do you solemnly swear that you will well and truly interpret unto this witness (name)_____ the oath which shall now be administered to him so help you God."

It is to be noted that in the case of the witness Isadora Losada (Tr 20) he "was duly sworn AND AFTER THAT, Mrs. Suzan M. Murray was duly sworn as interpreter. The question immediately arises as to whether this witness, who required an interpreter, understood the witness oath at all.

At page 75 of the reporter's transcript, when Noila Miranda was produced, as the main and only identifying witness, the only qualification of the interpreter is shown as follows:

> "THE COURT: Mrs. Murray, you have previously been sworn as an Interpreter in this case.
> THE INTERPRETER: Right."

Even if there had been some inquiry made as to the competency of the interpreter, which was not done would this have been sufficient, assuming that the usual oath had been given to the interpreter when she testified for the previous witness, Isadora Locada? It is strenuously contended that it would not have been sufficient since the usual oath given an interpreter is a personal one for each individual witness, reciting the name of that particular witness in the body of the oath. Hence, an oath given to an interpreter stating "Do you solemnly swear that you will well and truly interpret unto this witness, ISADORO LOCADA the questions as to which shall be propounded to him" can hardly be applicable to the witness NOILA MIRANDA, as to the questions propounded to her.

Leaving the technical aspects as to whether a personalized oath given to an interpreter could be considered as a blanket qualification for all subsequent witnesses, which is by no means admitted or conceded, the pure and simple fact is that no one in this trial ever established the competency of the said interpreter. So far as the appellant knows, the interpreter appearing against him may have been quite incompetent, or even a complete fraud.

Appellant contends that a person engaged in discharging the obligations of an interpreter is a witness and the principles governing ordinary testimony are applied to his services. People v. Len Deo 132 Cal. 199, 64 P. 265 (1901). The task of translating the testimony of a witness from one language to another of necessity requires the services of an expert. An expert so produced must be subjected to being qualified just like any other expert witness and his competency must be proved before his or her testimony is accepted. Mo. K&T. Ry. Co. v. Lesley 60 Kan. 424, 56 P. 759 (1899).

It is admitted that the need of an interpreter and the qualifications of a person proposed as such are matters resting in the discretion of the trial judge. Lujan v. United States. C.A.N.M. 209 F 2nd 190 (1953). Hilbert v. Kundicoff 204 Cal. 425, 268 P. 905 (1928); State v. Horich 130 Wash. 243, 226 P 1016 (1924), writ of error dismissed 271, U.S. 690, 70 L. Ed. 1153, 46 S. Ct. 472. It is not conceded that a trial court can disregard the question of competency altogether, as was apparently done in this case, and merely instruct the courtroom clerk to swear the interpreter without first inquiring as to the background of the proposed interpreter, his education, his training and knowledge regarding the respective languages involved and other similar questions generally asked of an expert

witness as a condition precedent, prior to exercising the Court's discretion in accepting or not accepting the interpreter as a witness. Failure to do so is an abuse of discretion. Any objection that can be made to a witness' competency to take an oath may be pressed against the acceptance of a person as an interpreter. Birmingham R. Light & P. Co. v. Jung 161 Fla. 461, 49 So. 434 (1909). The appellant should have been invited to cross-examine and question the qualifications of the interpreter, which was not done in this case. Mo. K. & T Ry Co. v. Lacley 60 Kan. 424, 56 P. 759 (1899). The qualifications of an interpreter are the subject of proper inquiry.

In addition to the foregoing objections to the use of the interpreter produced by the prosecution, the appellant contends that he was denied due process in not being furnished an interpreter who could have been duly qualified to interpret and act on behalf of the accused. It is admitted that no request was made by anyone on behalf of appellant for such interpreter but appellant states that in the interest of fairness and due process, the trial court should have, sua sponte, apprised appellant of his right to have an interpreter in his behalf. Provision for the furnishing of an interpreter is made in the law as recited in the United States Code,

Title 18, Section 3006 A (e) which states as follows for services other than counsel:

> "Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain services on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The court shall determine reasonable compensation for the services and direct payment to the organization or person who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source. The compensation to be paid to a person for such services rendered by him to a defendant under this subsection, or to be paid to an organization for such services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred."

In the case of Christian v. United States 398 F 2d 517 (1968) it was held that although counsel has the primary responsibility of determining whether the employment of an investigator or other expert services are necessary, the proper and effective administration of this section requires the trial judge to satisfy himself that such services are necessary and to articulate the

reason therefor.

Appellant maintains that had he been furnished an interpreter he, through his counsel, could have been in a better position to cross-examine the witnesses appearing against him.

The instant case can be contrasted with the case of Mares v. United States (C.A. Tex) 391 F 2d 530 (1968) which was appealed on the ground that the accused was denied his rights under the Sixth Amendment to confront the witnesses against him because the accused spoke only Spanish and there was no interpreter provided. But that case was affirmed because it was shown that the judge, the lawyer and the defendant himself spoke Spanish. However, in the instant case, it can be ascertained that only the witness against the appellant spoke Spanish. The "interpreter" may or may not have been fluent in the Spanish language. No one ever took the trouble to find out. A new trial should be granted the appellant to make sure.

CONCLUSION

For the reasons stated, appellant avers that he was not given a fair trial and was not granted due process. The judgment should be reversed and he should be granted a new trial.

Respectfully submitted

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